6/16/27/2020

ATTORNEY GENERAL'S STATEMENT

The Clean Water Act (CWA), in accordance with 40 C.F.R. Part 233, 33 U.S.C §§ 1344(g)-(h), provides states the ability to assume the Section 404 dredge and fillprogramfill program in certain waters, subject to Environmental Protection Agency (EPA) approval of a state's program submission. In part, a state's program submission must include an Attorney General's statement, as set forth in 40 C.F.R. § 233.12, and 40 C.F.R. § 233.10. More specifically:

- A state that seeks to administer a 404 program must submit to the EPA's Regional Administrator a statement that the laws and regulations of the state provide adequate authority to carry out the program and meet applicable requirements of 40 C.F.R. Part 233; 40 C.F.R. § 233.10(c); and 40 C.F.R. § 233.12.
- The statement must cite specific statutes and administrative regulations which are lawfully adopted at the time the statement is signed and which shall be fully effective by the time the program is approved, and where appropriate, judicial decisions which demonstrate adequate authority. 40 C.F.R. § 233.12(a).
- Where more than one agency has responsibility for administering the state program, the statement must include certification that each agency has full authority to administer the program within its category of jurisdiction and that the state, as a whole, has full authority to administer a complete state sectionSection 404 program. 40 C.F.R. § 233.12(d).
- The statement must contain a legal analysis of the effect of state law regarding the prohibition on taking private property without just compensation on the successful implementation of the state's program. 40 C.F.R. § 233.12(c).
- The attorney signing the statement must be the state Attorney General or the attorney for the state agencies which have independent legal counsel and must have the authority to represent the state agency in court on all matters pertaining to the state program. 40 C.F.R. § 233.12(a).

The summaries set forth below identify the federal requirements which Florida must meet and the statutes and rules which provide the State of Florida with adequate authority to carry out the program and meet applicable requirements. Unless otherwise provided, the applicable statutory and regulatory authorities for Florida to assume and implement the federal 404 program are found in: §§Part IV, Chapter 373.4131, 373.414, 373.4143, 373.4144, and 373.4146, F.S.;, Chapters 62-330 (Environmental Resource Permitting), 62-340 (Delineation of the Landward Extent of Wetlands and Surface Waters), and 62-331 (State 404 Program), F.A.C.; the Applicant's Handbook Volume I (incorporated by reference in paragraph 62-330.010(1.)(a), F.A.C.) and the State 404 Program Applicant's Handbook (incorporated by reference in subsection 62-331.010(5), F.A.C.). Additional authorities applicable to the State 404 Program include Chapters 120 (Administrative Procedures Act) and 403 (Environmental Control), F.S., and Chapters 62-4 (Permits), and 62-110 (Exceptions to the Uniform Rules of Procedure).

Chapter 62-331, F.A.C., the State 404 Applicant's Handbook, the amendments to Chapter 62-330, F.A.C., and Applicant's Handbook Volume I are adopted and shall become fully effective upon EPA's publication of state program approval via Federal Register notice.

Commented [GSA1]: Can we just say Part IV, Chapter 373?

Commented [NKZ]: I don't see 373.430 - criminal statute

Commented [SJ382]: Yes, though I think these authorities may be "otherwise provided" below. If 373.430 is added here, 373.129 should be added too.

Commented [GSA4]: Do we need to reference all applicable rules, such as our proprietary rules, and 62-4, 62-110, etc.?

Commented [CR5]: Matt – I think the second sentence ("Transfer … shall not be effective until such notice appears in the Federal Register.") precludes notification being the effective date unless it is also the FRN publication date.

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Purpose and Scope of Program

40 C.F.R. § 233.1: A state program must regulate all discharges of dredged or fill material into waters regulated by the State under ~~section~~Section 404*(g)-(l)*, except as provided in Section 404(f) and 40 C.F.R. § 232.3 (which exempt specified activities from permitting requirements). Nothing precludes a state from operating or enforcing requirements which are more stringent or from operating a program with greater scope, than required under 40 C.F.R. Part 233. Where an approved state program has a greater scope than required by federal law, the additional coverage is not part of the EPA-approved program and is not subject to EPA oversight or enforcement. While the state may impose more stringent requirements, it may not impose any less stringent requirements for any purpose. The approved state program shall, at all times, be conducted in accordance with the requirements of the CWA and 40 C.F.R. Part 233.

FLORIDA AUTHORITY: Florida has authority to regulate all waters in the state, subject to the specified exemptions set forth in ~~§§~~Sections 373.406, 373.4145, and 403.813, F.S. *See* § 373.023, F.S. This authority includes the regulation of dredging and filling in surface waters or wetlands, as delineated in ~~§~~Section 373.421(1), F.S., through its statewide environmental resource permitting (ERP) program. *See generally* §§ 373.4131; 373.414; 373.4143; and 373.4144, F.S. "Surface waters," "waters in the state" and "wetlands" are defined by statute in ~~§~~Section 373.019, F.S., and are more expansive than those waters regulated by the CWA.

~~The State has~~ Pursuant to the authority granted in Section 373.4146, F.S., Florida is seeking to ~~seek assumption of~~assume the CWA ~~section~~Section 404 dredge and fill ~~permitting~~ program. ~~See §§ 373.4143, 373.4144, and 373.4146, F.S. for implementation in waters of the United States, as defined in 40 C.F.R. Part 120, that the state assumes pursuant to Section 404 of the CWA.~~ This authority includes adopting any federal requirements, criteria, or regulations necessary to obtain assumption, including, but not limited to, the guidelines specified in 40 C.F.R. Part 230 and the public interest review criteria in 33 C.F.R. § 320.4(a), and ~~implementing~~to implement the 404 dredge and fill permitting program in conjunction with the environmental resource permitting program established in Chapter 373, F.S., and Chapter 62-330, F.A.C.

Provisions of state law that conflict with federal requirements do not apply to state 404 permits. § 373.4146(3), F.S. As such, the exemptions to ERP permitting established in ~~§§~~Sections 373.406, 373.4145, and 404.813, F.S., do not apply to state 404 permits. § 373.4146(4~~)~~, F.S. Rather, the state has the authority to regulate all discharges of dredged or fill material into waters regulated by the state under ~~section~~Sections 404 *(g)-(l)*, subject only to the exemptions provided in 33 U.S.C. § 404(f) and 40 C.F.R. § 232.3. ~~Florida intends to assume all waters within the federal definition of waters of the United States, except Corps retained waters.~~

The State has promulgated Chapter 62-331, F.A.C., to bridge the gap between existing state and federal law, thus ensuring that the State 404 Program is at least as stringent as, and meets the requirements of, the CWA and 40 C.F.R. Part 230.

Indian Country, as defined in 18 U.S.C. § 1151, is not included in Florida's 404 program.

Permit Prohibitions

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Commented [NK6]: It looks like most places use section sysmbol but sometimes section is spelled out and others there is an s. Flagging for consistency.

Commented [NK7]: flagging for consistency

Commented [GSA8]: I'm not sure about including these citations. Maybe 4143, but not necessarily 4144.

Commented [HK9R8]: Simma didn't we decide some time ago that states don't need to comply with the Corps public interest review criteria that they need to meet the criteria at 40 CFR 124 and 233 and the regulations implementing part 25 of the CWA?

Commented [MH10]: Consider re-wording to highlight implementation

Commented [HM11]: Shouldn't this read "into waters regulated by the state under section 404(g)-(l)" per 40 CFR 233.1(b)? As written, this statement would suggest that FL can regulate the dredge and fill program in all waters in the state, including waters of the state, assumed waters, and retained waters, subject only to federal exemptions.

Commented [NK12R11]: I thought at one point we also discussed that FL would include in its AG statement something along the lines of the following: FL intends to assume all waters aside from COE-retained waters within the federal definition of waters of the U.S., with a current citation.

Commented [HK13R11]: So, this is confusing as written. The state can regulate discharges under ERP into all waters of the state, but the state 404 program is only for discharges into waters of the US not retained by the Corps. This paragraph needs clarification.

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40 C.F.R. § 233.20: PermitsThis regulation provides that no permit shall be issued by the state must complyunless in compliance with 40 C.F.R. Part 230. The regulation further states that state permits cannot be issued if objectedthe requirements of the CWA and its implementing regulations, including the 404(b)(1) guidelines; when there is an unresolved objection to by the Regional Administrator, if a discharge in a prohibited area under 33 U.S.C. § 1344(c) will result, when the discharge would be in an unpermitted disposal site or would fail to comply with a restriction imposed under 33 U.S.C. § 1344(c) Section 404(c) of the CWA, or if issuance of the permit will impede navigation.

Commented [NK14]: does not include complete language from 233.20(c), which states that no permit when proposed discharges would be in area which has been prohibited, withdrawn, or denied as a disposal site by Administrator under 404(c).

Commented [LK15R14]: comment for FDEP to stick to reg language in 233.20 ©, 233.20(d)

FLORIDA AUTHORITY: Rule Subsection 62-331.053(3)(a), F.A.C., implements the conditionsprohibition in 40 C.F.R. § 233.20(a) by providing that "No permit shall be issued . . . When the project is inconsistent with the requirements of [Chapter 62-331] and the 404 Handbook. The state has prepared a regulatory crosswalk that demonstrates each specific provision in state rule that implement the criteria set forth in the CWA, and 40 C.F.R. PartParts 230 (the 404(b)(1) guidelines) through 233 . Paragraph 62-331.053(3)(d), F.A.C., implements the prohibition in 40 C.F.R. § 233.20(b) by providing that "[n]o permit shall be issued . . . "[w]hen the EPA has objected to issuance of the permit and the objection has not been resolved." Paragraph 62-331.053(3)(e), F.A.C., implements the prohibition in § 233.20(c) by providing that "[n]o permit shall be issued . . . [w]hen the proposed dredge or fill activity would be in an area which has been prohibited, withdrawn, or denied as a disposal site by the EPA under sectionSection 404(c) of the CWA, or when the activity would fail to comply with a restriction imposed thereunder." Paragraph 62-331.053(3)(f), F.A.C., implements the prohibition in § 233.20(d), by providing that "[n]o permit shall be issued . . . [i]f the Corps determines, after consultation with the Secretary of the Department in which the Coast Guard is operating, that anchorage and navigation of any of the navigable waters would be substantially impaired."

General Permits

40 C.F.R. § 233.21: A state may administer and enforce general permits previously issued by the Corps. Additionally, a state may issue general permits for categories of similar activities that will cause only minimal adverse environmental effects when performed separately and only minimal cumulative adverse effects. Any general permit shall comply with the federal guidelines; contain the conditions specified in 40 C.F.R. § 233.23; describe the specific activity authorized; describe the precise area of the authorized activity; contain predischarge notification requirements as appropriate; and if necessary allow an individual permit to be required after a general permit is issued.

FLORIDA AUTHORITY: The state intends to administer and enforce a limited number of regional general permits issued by the Corps until they expire. Pursuant to 40 C.F.R. § 233.14(b)(3), these general permits, and the procedures whereby the Department and Corps will exchange relevant information, are identified in the Memorandum of Agreement (MOA) between the State of Florida Department of Environmental Protection (DEP) and the U.S. Army Corps of Engineers (Corps).

In addition, the state has promulgated a series of general permits in Chapter 62-331, F.A.C., which authorize activities that meet the conditions specified in 40 C.F.R. § 233.21. They comply with the

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federal guidelines, describe the authorized activity and area, contain any appropriate predischarge notification requirements, and allow for the issuance of an individual permit after the issuance of a general permit. The permit conditions for general permits are provided in Rule 62-330.405, except subsections (7) and (10), and Rule 62-331.201, F.A.C. The conditions in Chapter 62-331 are specific to the 404(b)(1) Guidelines, applicable sectionSection 303 water quality standards, applicable sectionSection 307 effluent standards and prohibitions, and the criteria set forth in 40 C.F.R. 233.23. Subsection 62-331.200(6), F.A.C., provides the circumstances under which an individual permit may be required after a general permit is issued.

Emergency Permits

40 C.F.R. § 233.22: A state may issue temporary emergency permits in instances where unacceptable harm to life or severe loss of physical property is otherwise likely to result, so long as such permits are limited to 90 days duration, contain appropriate restoration as a condition, can be terminated at any time to protect human health or the environment, and are the subject of public notice ten days after issuance, as well as expeditious federal agency consultation.

FLORIDA AUTHORITY: Rule 62-331.110, F.A.C. implements the requirements for the issuance of emergency authorizations. Subsection (3) of this rule limits the duration of emergency authorizations to 90 days and subsection (6) provides for circumstances where the emergency permit holder must apply for a permit within the 90-day authorization period. Subsection (4) provides for the termination of an emergency authorization without process any time DEP determines it necessary to protect human health or the environment. Subsection (5) provides for notice and an opportunity to comment as soon as possible but no later than 10 days after issuance, and subsection (7) provides for consultation with EPA, the Corps, U.S. Fish and Wildlife Service (FWS), the tribes, and the National Marine Fisheries Service (NMFS), as applicable.

Permit Conditions

40 C.F.R. § 233.23: Each state issued 404 permit must include specified conditions which assure compliance with federal guidelines, water quality standards and effluent standards and prohibitions; be of a fixed term as limited under the CWA; identify the specifics and scope of the authorized activity; and identify the purpose, type and quantity of discharge. The regulations also include requirements that the permittee stop work if necessary for compliance, take reasonable steps to minimize or prevent violations, inform the agency when non-compliance occurs, provide information requested by the agency, monitor and report as appropriate and keep records, allow the agency to inspect and enter its premises, and minimize the impacts of its discharges.

Commented [LK16]: stick to reg language ,particularly in 233.23(a) and (c). Notable omissions include restrictions (c) (7)

Commented [LK17R16]:

FLORIDA AUTHORITY: Rules 62-330.350, 62-331.053, and 62-331.054, F.A.C. implement the general permit conditions for individual permits. The conditions in Chapter 62-331.053 are specific to the 404(b)(1) guidelines, applicable sectionSection 303 water quality standards, and applicable sectionSection 307 effluent standards and prohibitions. The state has prepared a regulatory crosswalk that demonstrates each specific state rule that implements the criteria set forth in the 404(b)(1) guidelines. Rule 62-330.054 implements the criteria set forth in 40 C.F.R. § 233.23(c). In addition, Rule 62-331.090, F.A.C., limits the duration of permits to the maximum timeframe allowable under federal law.

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Permit Application Process

40 C.F.R. § 233.30: The permit application process contains procedures that must be followed to apply for an individual permit. These procedures require applicants provide their name, address and telephone number, and the addresses of adjacent property owners, § 233.30(b)(1); to describe the proposed activity, including its location, purpose and intended use, to describe the scheduling of the activity, the location and dimension of adjacent structures, and all other needed approvals, § 233.30(b)(2); to describe the type, composition, source and quantity of materials to be discharged, the method of discharge, and the site and plans for disposal of dredged or fill material, § 233.30(b)(3); and to certify that all information provided is accurate and that the applicant is aware of the penalties for providing false information. § 233.30(b)(4). All activities reasonably related to the proposed project should be included in the application. § 233.30(b)(5). In addition, the applicant will be required to furnish additional information the State deems appropriate to evaluate the application, and to provide a detailed analysis of environmental considerations. § 233.30(c)&(d).

FLORIDA AUTHORITY: Paragraph 62-331.060(1), F.A.C., implements the application requirements in 40 C.F.R. §§ 233.30(b)(1) – (4). Paragraph 62-331.051(2), F.A.C., implements the application requirement in § 233.30(b)(5). Paragraph 62-331.052(1), F.A.C., implements the application requirement in § 233.30(c). The state provides permit applicants guidance regarding the level of detail needed when analyzing the environmental considerations required under §Section 233.30(d) in its applicant's handbooks.

Coordination Requirements

40 C.F.R. § 233.31: A state must give any other state which may be affected by a permit action the opportunity to submit written comments on and object to a proposed permit. The regulation also requires a state to coordinate its permitting activity with federal and state water planning and review processes.

FLORIDA AUTHORITY: Rule 62-331.060(5), F.A.C., implements the coordination requirements in 40 C.F.R. § 233.31 by providing a process by which any state whose waters may be affected by a proposed activity may submit written comments and suggest permit conditions within the public notice comment period. The rule provides for EPA review should the State not accept the recommendations.

Public Notice

40 C.F.R. § 233.32: This regulation specifies the circumstances and manner in which the public must be notified of ~~permit applications or major permit modifications and~~ and given the opportunity to comment on ~~them~~certain agency actions. The regulation also specifies information required to be included in the public notices, and the procedures required to give notice of any public hearing ~~held on the permit action~~.

FLORIDA AUTHORITY: ~~Section~~Subsections 62-331.060(2) – (3), F.A.C., fully implement the public notice requirements of 40 C.F.R. § 233.32(a) – (c) and (e) for individual permits, emergency permits, major modifications and the scheduling of a public hearing. Draft general permits that are

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promulgated through the rulemaking process are open to public notice and comment pursuant to ~~section 120.54, F.S.~~Section 120.54, F.S. Subsection 62-331.060(2), F.A.C., and Section 5.3.1 of the 404 Applicant's Handbook require all notices, including those for applications noticed pursuant to subsection 62-331.060(8), F.A.C., must contain the information required by 40 C.F.R. § 233.32(d).

Public Hearing

40 C.F.R. § 233.33: This regulation identifies the circumstances under which a public hearing must be held on a permit action and contains the procedures applicable to such a hearing. Any interested person may request a public hearing, in writing, during the public comment period. The state shall hold a hearing whenever it determines there is a significant degree of public interest in an application or draft general permit, and may hold a hearing when it determines a hearing would be useful to making a decision on an application. or draft general permit. Any person may submit oral or written comments or information concerning the application ~~or draft general permit.~~ The public comment period shall automatically be extended at the close of the hearing or as determined by the presiding officer. All public hearings shall be recorded and the record of proceedings shall be made available to the public.

FLORIDA AUTHORITY: Section 62-331.060(4), F.A.C., implements the standards and procedures for public meetings required by 40 C.F.R. § 233.33(a)-(d). Paragraph 62-331.060(3)(c), F.A.C., implements the provisions of 40 C.F.R. § 233.33(c), regarding the extension of the public comment period. Hearings on draft general permits that are promulgated through the rulemaking process are subject to procedures set forth in Section 120.54, F.S., and are mandatory when requested by a member of the public.

Decision on Permit Application

40 C.F.R. § 233.34: The permit decision-making process contains requirements for making permit decisions, including requirements that permit applications be reviewed for compliance with the 404(b)(1) guidelines and/or equivalent state environmental criteria as well as any other applicable State laws or regulations; that no permit may be issued unless compliance with 40 C.F.R. § 233.20 is achieved; and that the State's determination must be available to the public before becoming final. In addition, all comments received in response to the public notice, and public hearing if one is held, must be considered and all comments and the record of any public hearing shall be made part of the official record on the application.

FLORIDA AUTHORITY: The issuance of all individual permits is conditioned on compliance with Rules 62-330.301, 62-330.302, F.A.C., as well as Rule 62-331.053, F.A.C., which collectively contain the state environmental criteria equivalent to the 404(b)(1) guidelines. The state has prepared a regulatory crosswalk that demonstrates each specific state rule that implements the criteria set forth in the 404(b)(1) guidelines. Additionally, pursuant to Rule 62-331.070, F.A.C., no permit may ~~issue~~be issued without compliance with state water quality standards, the Coastal Zone Management Program, and as detailed above, the prohibitions set forth in 40 C.F.R. § 233.20. The state's determination is available to the public prior to it becoming final via Rule 62-331.060,

Commented [NK18]: Previously discussed including something like: FL does think it is obligated under federal law and is planning to and will ensure it will provide public notice of full scope of what second/third round permits contain and won't issue permits that aren't compliant with 404b1 guidelines or fl's equivalent. Problematic language re: public notice is in subparagraph (8), which is not included within FL's range.

Commented [LK19R18]: FL does think it is obligated under federal law and is planning to and will ensure it will provide public notice of full scope of what second/third round permits contain

Commented [NK20]: Does not state that permits must comply with (b)(1) guidelines.

Commented [LK21R20]: Permits must be in compliance with (b)(1)

Commented [NK22]: "as detailed above" may not pick up 233.20(a), since that was not specifically identified.

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F.A.C., and the official record is available to the public through Florida's public records laws (e.g., Chapter 119, F.S.).

Permit Issuance and Effective Date

40 C.F.R. § 233.35: These regulations set forth the procedures for finalizing an application following EPA review. In instances where EPA comments on a permit, the state issues the permit under the procedures set forth in 40 C.F.R. § 233.50. In instances where EPA does not comment on a permit, permit decisions shall be made after the close of the public comment period, with notice to the applicant, and the reasons for any denial shall be set forth in writing. The regulation also provides that a permit shall become effective upon signature by the appropriate state official and the applicant.

FLORIDA AUTHORITY: Rule 62-331.052(3), F.A.C., implements the provisions of 40 C.F.R. § 233.35, including the process set forth in 40 C.F.R. § 233.50.

Permit Modification, Suspension, or Revocation

40 C.F.R. § 233.36: This regulation specifies certain circumstances under which permits may be modified, suspended, or revoked. These circumstances include instances of non-compliance; misrepresentation during the application process; the issuance of a general permit when an individual permit would have been appropriate; changes in circumstances since permit issuance; the presence of significant, previously unavailable information; and revised regulations. The regulation further provides that, with the exception of minor modifications, permit modifications must be subject to public notice and comment and to coordinate with federal review agencies. Minor modifications may use abbreviated procedures and are available to: correct typographical errors; increase the frequency of monitoring or reporting; allow for a change in ownership or operational control over a project; provide for minor modification of project plans that do not significantly change the character, scope and/or purpose of the project; or extend the term of a permit so long as the modification does not extend the term of the permit beyond 5 years from its original effective date and does not result in any increase in the amount of dredged or fill material allowed to be discharged.

Commented [SR23]: Mentions 5 years, though doesn't say the maximum term 'is' 5 years. Just flagged in case this implies a 5 year term for permits

Commented [NK24]: there are a number of places where the federal regs are summarized but missing components of the regulatory language. for instance, here the statement is: extend the term of a permit, so long as the modification does not extend the term of the permit beyond 5 years from its original effective date AND does not result in any increase in the amount of dredged or fill material allowed to be discharged.

FLORIDA AUTHORITY: The suspension or revocation of permits shall be conducted in accordance with Section 373.429, F.S. The state will process applications for modifications in accordance with Rule 62-330.315(1) through (3), F.A.C., and ~~section~~Section 6.2 of Applicant's Handbook Volume I, as applicable. The state will reevaluate the circumstances and conditions of a permit considering the factors set forth in Rule 62-331.080(2), F.A.C., which implements the criteria set forth in 40 C.F.R. § 233.36(a). Rule 62-330.315(2), F.A.C., sets forth the types of requests that will qualify for minor modifications, and provides that minor modifications are not subject to public notice and comment. Pursuant to paragraph 62-331.080(4), major modifications and the suspension or revocation of permits are subject to the public notice requirements set forth in Rule 62-331.060, F.A.C.

Signature on Application

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40 C.F.R. § 233.37: This regulation requires a permit application to be signed by the applicant, or an authorized agent if accompanied by a statement by that person designating the agent. The signature of the applicant or agent will be understood to be an affirmation that he possesses or represents the person who possesses the requisite property interest to undertake the activity proposed in the application.

FLORIDA AUTHORITY: Rule 62-331.051(1), F.A.C., implements the requirements of 40 C.F.R. § 233.37, by requiring an applicant use Form 62-330.060(1) – "Application for Individual and Conceptual Approval Environmental Resource Permit, State 404 Program Permit, and Authorization to Use State-Owned Submerged Lands." Part 4, Section A of this Form requires the signature of the applicant or the applicant's agent; Section B requires the certification of real property interest; and Section C requires the Designation of Authorized Agent (if applicable). Noticed general permits require the use of Form 62-330.402(1), which requires substantially the same information and certification.

Continuation of Expiring Permits

40 C.F.R. § 233.38: This regulation prohibits the continuation of any Corps 404 permit beyond its expiration date under federal law after assumption. States authorized to administer the 404 Program may continue Corps or State issued permits until the effective date of the new permits, if State law allows. Otherwise, the discharge is being conducted without a permit from the time of expiration of the old permit to the effective date of a new State-issued permit, if any.

FLORIDA AUTHORITY: Rule 62-331.090, F.A.C., implements the requirements of 40 C.F.R. § 233.38 by providing that the duration of individual permits will be specified in the permit but shall not exceed the maximum timeframe allowable under federal law and reasonably necessary to complete the project. In addition, Section 6 of the 404 Handbook provides that individual permits may be administratively continued while an application for a new permit is under review when unexpected project delays cause a project to require more time to complete.

Electronic Reporting

40 C.F.R. § 233.39: This regulation requires states to satisfy the requirements for electronic reporting in 40 C.F.R. Part 3 in its state program if the state chooses to receive electronic documents.

FLORIDA AUTHORITY: The Department receives electronic documents through its ESSA (Electronic Self-Service Application Portal) and EzDMR (Electronic Discharge Monitoring Report) applications, which have been compliant with CROMERR (EPAs Cross Media Electronic Reporting Rule) since January 2012.

Requirements for Compliance Evaluation Programs

40 C.F.R. § 233.40: This regulation requires a state maintain a program designed to identify violators, to have authority to enter and inspect a violator's property, including the ability to copy

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records, take samples, and otherwise to investigate compliance with the state program, and to have a method for receiving information from the public on violations.

FLORIDA AUTHORITY: The State has authority to enforce rules and regulations promulgated under Part IV of Chapter 373, F.S., including the Environmental Resource Permit (ERP) program and the State 404 Program. Such regulatory violations include failure to obtain a required permit or failure to comply with permit conditions. *See* §§ 373.129(1) and (7); § 373.430(1), F.S. Several state statutes grant the Department the authority to access and inspect sites, take samples and gather information and evidence. §§ 373.423, 403.091, F.S. Other sources of site access authority include permits, consent orders, other administrative orders, permission forms, easements and licenses, inspection warrants, and court orders. *See generally* Chapters 373 and 403, F.S., and more specifically §§ 403.091, 403.121(2), F.S. *See also* Rules 62-331.054(1), 62-330.350(1)(m), 62-331.201(1), 62-330.405(8), and Applicant's Handbook Volume I, sectionSection 1.7. Florida has procedures for receiving and considering information from the public on violations contained in §Section 403.412(2), F.S.

Enforcement Authority Requirements

40 C.F.R. § 233.41: This regulation requires a state have authority to restrain unauthorized activity, to sue to enjoin violations, and to assess or to sue to recover civil penalties of at least $5,000 per day for each civil violation, and of at least $10,000 per day of each criminal violation. In addition, a state must be able to seek criminal fines of at least $5,000 for providing false information or tampering with a monitoring device, and must be able to assess a civil or criminal violation for each day during which a violation continues.

FLORIDA AUTHORITY: Florida law is consistent with and no less stringent than the specified enforcement provisions. *See* §§ 373.129 and 373.430, F.S. DEP has the authority to restrain unauthorized activity, §§ 373.129(1) and 373.430(1); to enjoin and abate violations of statutes, rules, and orders adopted pursuant to Chapter 373 F.S., § 373.129(2); and to recover civil penalties up to $15,000 per violation, § 373.129(5).

Commented [SG25]: Update in accordance with HB1091

DEP can seek criminal remedies against someone who willfully, or with criminal negligence (with reckless indifference or gross careless disregard), discharges dredged or fill material without the required permit or in violation of any permit condition, in the amount of $10,000. §§ 373.430(5) and (6); and knowingly makes false statements, representation or certification in any application, record, report, plan, or other document filed or required to be maintained part IV, Chapter 373, or falsifies tampers with or knowingly renders inaccurate any monitoring device or method required to be maintained under the permit in an amount of $10,000. § 373.430(5), F.S.

Commented [BW26]: Comment from JT Morgan: We should be alerting management that the intent standard requirement of 233.41(b)(2) may rip us here. That's because our primary argument made in the EPA litigation addressing the companion regulations in 402, rested in large measure on the note in 123.27(a)(3)(iii). In EO, we argued in part that the (a)(3)(iii) note subsumed the (b)(2) requirement that states implement the same intent standards as EPA. Absent the note, our position for allowing Florida to implement a more burdensome intent standard than ordinary negligence is on much weaker ground and therefore a more risky legal position; i.e., Florida's legal authority could be subject to challenge.

Each date during which a violation occurs constitutes a separate offense. §§ 373.129(5); 373.430(3), F.S. *See also* §§ 373.129(7), 403.121(1) and (2), 403.131, 403.141, and 403.161, F.S. Additionally, the EPA may overfile pursuant to Section 309 of the CWA.

Public Participation

40 C.F.R. § 233.41(e): This regulation requires a state to assure public participation in enforcement proceedings by either authorizing citizens to intervene in civil or administrative proceedings as of

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right, or by investigating and giving written responses to citizen complaints; not opposing permissive intervention; and giving the public a 30-day comment period on any proposed settlement of an enforcement action.

FLORIDA AUTHORITY: Florida has adequate legal authority to comply with 40 C.F.R. § 233.41(e)(2)[.] and has provided assurance that it will comply with 40 C.F.R. § 233.41(e)(2) in its MOA with the EPA.

Commented [SJ27]: I am proposing these changes to help fulfill the objective of the AG's statement here (i.e., that the laws of the state provide authority to carry out this aspect of the program). Reference to the MOA is helpful, but not sufficient on its own, I do not think.

Program Reporting

40 C.F.R. § 233.52: This regulation requires the State to report annually to the EPA an evaluation of the State's administration of the program identifying problems the State has encountered and recommendations for resolving them. The draft report should be submitted within 90 days of the completion of the annual period (as identified in the MOA) and made available for public inspection. EPA will review the report and transmit any comments, after which the State has 30 days to finalize the annual report.

FLORIDA AUTHORITY: Florida has adequate legal ~~authority~~authority to comply with 40 C.F.R. § 233.52, and has provided assurance that it will comply with 40 C.F.R. § 233.52 in its MOA with the EPA.

Effect of State Takings Law on Successful Implementation of Program

40 C.F.R. § 233.12: A state seeking authority to administer the federal 404 program must analyze the effect its takings law will have on successful implementation of the state 404 program. ~~In *Lucas v. South Carolina Coastal Commission*, the Court held that a regulatory scheme that deprives a property owner of all economically beneficial use of his property effects a "taking," unless the use of which property owner sought to make of his property was prohibited by the State's common law of public nuisance.~~ Under the Takings Clause in the Fifth Amendment to the United States Constitution, a state must compensate owners when the adoption or application of a law impinges on an owner's property interests, a scenario commonly described as a "regulatory taking." As interpreted, courts may require compensation for regulatory takings under a variety of circumstances, including: where the government's action removes all economically viable use of property; when a government action is deemed to have caused a physical invasion of property; when an "ad hoc" analysis (referred to as the *Penn Central* test) triggers a compensation requirement; and where a government unreasonably requires an exaction (e.g., a conservation easement) of property as a condition to a permit, without an appropriate nexus to the adverse effects that the permitted activity would cause. Government liability for compensation under the Takings Clause has changed a great deal over the past three decades, and future outcomes are difficult to predict.

Procedurally, until very recent times, federal courts required property owners to seek compensation in state courts before proceeding to federal court for compensation under a Fifth Amendment claim (at least, where state law allowed for an appropriate state remedy). In June 2019, the United States Supreme Court (in the *Knick* decision) departed from the line of cases requiring the exhaustion of state remedies. Presently, if an owner were to make a claim against the State of Florida for compensation as a result of an alleged taking, the owner could proceed directly

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to federal court against the Department, in which case the Department would be similarly situated to the Corps in the same scenario. In that scenario, the Department would be no more "impaired" than a federal agency implementing the same program.

Long before *Knick*, Florida courts recognized a claim for inverse condemnation to provide remedies for alleged regulatory takings. Presumably, notwithstanding the *Knick* decision, Florida courts will continue to allow those claims – leading to the theoretical possibility that Florida courts could expand state liability for compensation. For the reasons discussed below, this process will not interfere with the state's successful implementation of the program.

FLORIDA AUTHORITY: Article 10, ~~section~~Section 6, of the Florida Constitution prohibits the taking of private property for public use without just compensation, the same as Amendment 5 of the Bill of Rights. ~~Thus, Florida's takings law will not impact its implementation of the program to any greater extent than the extent to which federal takings law impacts Corps' implementation of the program. Pursuant to the provisions of section~~ 373.617, F.S., any person alleging a regulatory taking by DEP may seek review in a circuit court within 90 days of agency final action. One Florida Court has held that the standard for a "taking" under the Florida Constitution is identical to the standard under the Fifth Amendment (at least for res judicata purposes), and it is unlikely that Florida courts would expand liability for regulatory takings under the Florida Constitution, beyond the federal standard. Likewise, given the potential for review of a decision by the Florida Supreme Court to the United States Supreme Court, there is no reason to suppose that Florida courts would interpret the Fifth Amendment beyond the standards presently imposed by federal courts.

Commented [NK28]: flagging for consistency

Most importantly, Florida courts have recognized the distinction between an invalid agency action and an agency action that will require compensation as a regulatory taking. Under *Key Haven* and other Florida cases, an owner must either accept that agency action is valid, and then proceed in inverse condemnation, or pursue all administrative remedies to challenge the validity of agency action before seeking compensation in an inverse condemnation action. For many reasons, a potential taking does not mean that agency action is invalid under Florida law. As a result, even where a Florida agency is faced with an allegation that its position will lead to a taking, it may still successfully implement the regulation without regard to the question of a taking. For that reason alone, takings law will not interfere with Florida's implementation of the program.

Signing Authority for Attorney General's Statement

40 C.F.R. § 233.12: Where more than one agency has responsibility for administering the state program, the statement must include certification that each agency has full authority to administer the program within its category of jurisdiction. The attorney signing the statement must be the state Attorney General, or the attorney for the state agencies which have independent legal counsel, and must have the authority to represent the state agency in court on all matters pertaining to the state program.

FLORIDA AUTHORITY: DEP has responsibility for administering Florida's 404 program. *See* §§ 373.473, 373.4146 and 403.061, F.S. The attorney signing this statement is the independent

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legal counsel for DEP and has the duty and authority to represent DEP in court on all matters pertaining to the state 404 program. *See* §§ 20.255(2)(c) and 403.805(1), F.S.

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Justin Wolfe
General Counsel, Florida Department of Environmental Protection

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